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## Metromedia, Inc. v. City of San Diego {101 S. Ct. 2882 (1981)}: Municipal Billboard Regulation and the First Amendment

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## METROMEDIA, INC. v. CITY OF SAN DIEGO: MUNICIPAL BILLBOARD REGULATION AND THE FIRST AMENDMENT

Municipalities regulate commercial speech,<sup>1</sup> particularly signs and billboards,<sup>2</sup> as a means of confronting aesthetic, traffic safety, and other local problems.<sup>3</sup> Historically, municipal billboard regulations

1. The Supreme Court generally refers to commercial speech as "expression related solely to the economic interests of the speaker and its audience." *Central Hudson Gas & Electric Co. v. Public Service Comm'n*, 497 U.S. 557, 561 (1980). *See also* *Friedman v. Rogers*, 440 U.S. 1, 11 (1979); *Bates v. State Bar of Arizona*, 433 U.S. 350, 363-64 (1977); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976). *See generally* J. NOWAK, R. ROTUNDA & N. YOUNG, *HANDBOOK ON CONSTITUTIONAL LAW* 767 (1978) ("speech of any form that advertises a product or service for profit or for business purpose.")

2. Most courts examine billboard regulations under the commercial speech doctrine. One commentator has suggested that such a categorization confuses the medium with the type of message being conveyed. *See* Comment, *Metromedia, Inc. v. City of San Diego: Aesthetics, the First Amendment, and the Realities of Billboard Control*, 9 *ECOLOGY L.Q.* 295, 316-18 (1981) [hereinafter cited as *Billboard Control*]. Courts have not mechanically cast all sign control legislation, however, under the auspices of the commercial speech doctrine. *See* *State v. Miller*, 83 N.J. 402, 416 A.2d 821 (1980), in which the court noted that the defendant's "public interest" sign constituted "political speech and occupies a preferred position in our system of constitutionally protected interests." 416 A.2d at 826 (citing *Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943)). *See also* *John Donnelly & Sons v. Campbell*, No. 79-1575 (1st Cir. Dec. 22, 1980) (implication that the Maine billboard ban would be constitutional had it applied to commercial speech only); *Baldwin v. Redwood City*, 540 F.2d 1360 (9th Cir. 1975), *cert. denied*, 431 U.S. 913 (1977).

3. Historically, cities attempted to use their zoning powers (*see* note 17 *infra*) to protect the appearance of the community. *See, e.g.*, *State v. Diamond Motors, Inc.*, 50 Hawaii 33, 429 P.2d 325 (1967); *General Outdoor Advertising Co. v. Dept. of Pub. Works*, 289 Mass. 149, 193 N.E.2d 799 (1935), *appeal dismissed sub nom.*, *General Outdoor Advertising Co. v. Callahan*, 297 U.S. 725 (1936); *Cromwell v. Ferrier*, 19 N.Y.2d 263, 225 N.E.2d 749, 279 N.Y.S.2d 72 (1967). Early cases held that aesthetic considerations were insufficient to justify billboard regulations. *See, e.g.*, *Commonwealth v. Boston Advertising Co.*, 188 Mass. 348, 74 N.E. 601 (1905); *Kansas City Gunning Advertising Co. v. Kansas City*, 240 Mo. 659, 144 S.W. 1099 (1912); *State v. Whitlock*, 149 N.C. 542, 63 S.E. 123 (1908). *See also* 1 R. ANDERSON *AMERICAN LAW OF ZONING* § 7.16 (2d ed. 1976). Although courts gradually accepted aesthetics as a zoning consideration, additional justifications were required to support billboard regulations. *See* *Neff v. City of Springfield*, 380 Ill. 275, 280, 43 N.E.2d 947, 950

(1942); *St. Louis Gunning Advertising Co. v. St. Louis*, 235 Mo. 99, 137 S.W. 929 (1911). *See also* *Cumberland v. Eastern Federal Corp.*, 48 N.C. App. 518, 269 S.E.2d 672 (N.C. Ct. App. 1980) (aesthetic considerations are legitimate governmental concerns yet an ordinance may not be based solely upon them), *petition denied*, 273 S.E.2d 453 (1980). *Desert Outdoor Advertising, Inc. v. County of San Bernardino*, 255 Cal. App. 2d 765, 769, 63 Cal. Rptr. 543, 545 (1967) (county zoning ordinance may be based on aesthetic considerations if there is some other justification, such as economic advantage). *See generally* 1 ANDERSON, *supra* note 3, § 7.13, at 559; E. McQUILLAN, *MUNICIPAL CORPORATIONS* § 25.19 (3d ed. 1976); Note, *On the Threshold of a Taking: Limits on Municipal Exclusion of Billboards*, 48 U. COLO. L. REV. 123 (1976). The current majority position requires both an aesthetic and a separate non-aesthetic justification to support a billboard regulation. *Id.* *See also* Holme, *Billboards and On-Promise Signs: Regulation and Elimination under the Fifth Amendment*, in *PROCEEDINGS OF THE INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN*, 247, 267 (1974). A growing number of courts, however, recognize aesthetics as an independently sufficient ground to justify police power (*see* note 17 *infra*) regulation. *See, e.g.,* *Sunad, Inc. v. City of Sarasota*, 122 S.2d 611 (Fla. 1960); *John Donnelly & Sons v. Outdoor Advertising Bd.*, 369 Mass. 206, 218, 339 N.E.2d 709, 717 (1975); *Opinion of the Justices*, 103 N.H. 268, 169 A.2d 762, 764 (1961); *Westfield Motor Sales Co. v. Westfield*, 129 N.J. Super. 528, 539, 324 A.2d 113, 119 (1974). *See also* *Billboard Control*, *supra* note 2, at 309-11. Further, a growing number of commentators argue that aesthetics alone may be sufficient for regulation. *See, e.g.,* Norton, *Police Power, Planning, and Aesthetics*, 7 SANTA CLARA LAW 171 (1967); Sutton, *Billboard Regulations and Aesthetics*, 21 CLEV. ST. L. REV. 194 (1972); Williams, *Subjectivity, Expression and Privacy: Problems of Aesthetic Regulation*, 62 MINN. L. REV. 1 (1977); Note, *Beyond the Eye of the Beholder: Aesthetics and Objectivity*, 71 MICH. L. REV. 1438 (1973); Note, *Municipal Corporations: Sign Control Through Municipal Zoning Ordinances*, 27 OKLA. L. REV. 735 (1974); Note, *Outdoor Sign Regulation in Eden and Wisconsin*, 1972 Wis. L. Rev. 153 (1972).

Courts have also permitted billboard regulations under a traffic safety rationale. *See, e.g.,* *E. B. Elliot Advertising Co. v. Metropolitan Dade County*, 425 F.2d 1141, 1152 (5th Cir. 1970); *Lindsey v. Fayetteville*, 256 Ark. 352, 507 S.W.2d 101 (1974); *Kelbro, Inc. v. Myrick*, 113 Vt. 64, 68-70, 30 A.2d 527, 529-30 (1943) (upholding a statute banning offsite billboards within 300 feet of highway intersections and 240 feet from the center of any roadway under a "right to see and be seen" rationale). *See generally* 1 ANDERSON, *supra* note 3, § 7.09, at 548; Fonoroff & Terrill, *Controlling Traffic Through Zoning*, 21 SYRACUSE L. REV. 857 (1970). The traffic-safety rationale suggests that billboards obstruct a driver's view of cross traffic at intersections. *E.g.,* *Kelbro, Inc. v. Myrick*, *supra* note 3, at 70, 30 A.2d at 530. Traffic safety arguments point out that the goal of billboard advertising is to divert the motorist's attention from the road to the message. *Id.* Some commentators contend, however, that studies fail to substantiate a correlation between billboards and automobile accidents. *See, e.g.,* Moore, *Regulation of Outdoor Advertising for Aesthetic Purposes*, 8 ST. LOUIS U.L.J. 191, 197 (1963); Sutton, *Billboard Regulations and Aesthetics*, 21 CLEV. ST. L. REV. 194, 200 (1972). In fact, one commentator has suggested that billboards improve highway safety by reducing "highway hypnosis." Dowds, *Private Signs and Public Interests*, in *INSTITUTE ON PLANNING, ZONING AND EMINENT DOMAIN* 231 (1974).

Municipalities have traditionally used their zoning powers (*see* note 17 *infra*) to regulate a variety of local problems. *See* Note, *The Effect of First Amendment Protection of Commercial Speech on Municipal Sign Ordinances*, 29 SYRACUSE L. REV. 941,

withstood first amendment<sup>4</sup> challenges<sup>5</sup> due to the judicially formu-

942 (1978) (listing prevention of safety hazards, control of obscenity, and protection of the aesthetic environment) [hereinafter cited as Note, *Commercial Speech*]. See generally 1 ANDERSON, *supra* note 3, § 7.01-.33 (discussing, in great detail, legitimate objections of zoning); Sofaer, *Recent Developments in Local Government Law*, 7 URB. LAW. 1, 14 (1975) (discussing municipal control of obscenity); Note, *Colorado Municipal Government Authority to Regulate Obscene Materials*, 51 DEN. L.J. (1974); Comment, *Control of Panic Selling by Regulation of "For Sale" Signs*, 10 URBAN L. ANN. 323 (1975) (discussing the problem of "white flight" and closely related problem of "blockbusting.")

4. The first amendment states unequivocally that "Congress shall make no law . . . abridging the freedom of speech . . ." U.S. CONST. amend. I. The Supreme Court, however, has consistently held that some regulation of speech is necessary. *E.g.*, *Konigsberg v. State Bar of California*, 366 U.S. 36, 49-51 (1961) (rejecting the view that freedom of speech and association under the first and fourteenth amendments are absolute in both scope and protection); *Kovacs v. Cooper*, 336 U.S. 77, 88 (1949). See generally T. EMERSON, *TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT* 47-63 (1967); Hunter, *Prescription Drugs and Open Housing: More on Commercial Speech*, 25 EMORY L.J. 815, 818 (1976). In *Kovacs*, the Court declared that "[T]he preferred position of freedom of speech in a society that cherishes liberty for all does not require legislators to be insensible to claims by citizens to comfort and convenience. To enforce freedom of speech in disregard of the rights of others would be harsh and arbitrary in itself." 336 U.S. at 88.

Historically, the Court consistently limits the scope of constitutionally protected speech in at least two ways. *Konigsberg v. State Bar of California*, 366 U.S. at 49-50. First, the context or form of the expression may render it constitutionally unprotected. See, *e.g.*, *Roth v. United States*, 354 U.S. 476 (1957) (obscenity is not within the area of protected speech and press); *Yates v. United States*, 354 U.S. 298 (1957) (advocacy of forcible overthrow of the government in the context of teaching an abstract principle is not prohibited by the Smith Act). Secondly, regulatory statutes not intended to control the content of expression though limiting its exercise may remove speech from constitutional protection if supported by a valid governmental interest. See, *e.g.*, *Breard v. Alexandria*, 341 U.S. 622 (1951) (ordinance prohibiting door-to-door solicitation did not violate first amendment); *Cox v. New Hampshire*, 312 U.S. 569 (1941) (upholding state statute which prohibited a parade or procession on a public street without a special license). The Court in *United States v. O'Brien*, 391 U.S. 367 (1968), indicated that first amendment freedoms may be constitutionally abridged if the governmental regulation furthers an important or substantial governmental interest and "if the incidental restriction on alleged first amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.* at 377.

5. First amendment attacks are notably absent in challenges to municipal sign ordinances decided prior to *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.* 425 U.S. 798 (1976), and after *Valentine v. Chrestensen*, 316 U.S. 52 (1942). See, *e.g.*, *DeKalb Real Estate Board, Inc. v. Commissioners of Roads and Revenues*, 372 F. Supp. 748 (N.D. Ga. 1973). In *Barrick Realty, Inc. v. City of Gary*, 491 F.2d 161 (7th Cir. 1974), a sign ordinance withstood a first amendment challenge because of the commercial speech exception. See note 6 *infra*. See also *Commercial Speech*, *supra* note 3, at 942 n.3 (1978).

lated commercial speech exception.<sup>6</sup> Courts have only recently begun to afford commercial speech limited<sup>7</sup> first amendment protection.<sup>8</sup> In *Metromedia, Inc. v. City of San Diego*,<sup>9</sup> however, a divided<sup>10</sup> Supreme Court invalidated a municipal billboard-control ordinance<sup>11</sup> on first amendment grounds while noting that the ordinance permissibly regulated commercial speech.<sup>12</sup>

Appellants, two outdoor advertising corporations,<sup>13</sup> sought to en-

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6. The Supreme Court announced the commercial speech exception in *Valentine v. Chrestensen*, 316 U.S. 82 (1942). See note 33 and accompanying text *infra*. For thoughtful discussions of the first amendment commercial speech exception, see Farber, *Commercial Speech and First Amendment Theory*, 74 NW. U.L. REV. 372 (1979); Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429, 448-58 (1971) [hereinafter cited as *Free Expression*]; Rotunda, *The Commercial Speech Doctrine in the Supreme Court*, 1976 U. ILL. L.F. 1080; Note, *Freedom of Expression in a Commercial Context*, 78 HARV. L. REV. 1191 (1965); *Billboard Control*, *supra* note 2, at 315-33; Comment, *First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine*, 44 U. CHI. L. REV. 205 (1976).

7. The Supreme Court affords commercial speech less protection under the first amendment than noncommercial speech. See, e.g., *Central Hudson Gas & Electric Co. v. Public Service Comm'n*, 447 U.S. 557, 564 (1980). See *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 n.24 (1976). See generally notes 39-84, 112-120 and accompanying text *infra*.

8. The seminal case of *Bigelow v. Virginia*, 421 U.S. 809 (1975), extended limited first amendment protection to purely commercial speech. This comment will sketch the development of the commercial speech doctrine, its requirements, and their applications. See notes 39-84 and accompanying text *infra*.

9. 453 U.S. 490 (1981).

10. Justice White wrote for the plurality. Justices Stewart, Marshall, and Powell joined Justice White's opinion. Justice Brennan concurred in the judgment of the plurality and filed an opinion in which Justice Blackmun joined. Justice Stevens concurred in parts I-IV of the plurality opinion, yet dissented with opinion from parts V-VII and the judgment. Both Chief Justice Burger and Justice Rehnquist filed dissenting opinions. *Id.*

11. SAN DIEGO, CAL., CODE § 101.0700 (1972).

12. The plurality invalidated the ordinance because it impermissibly infringed upon noncommercial speech under the first amendment. 453 U.S. at 521. For a discussion of the plurality's rationale, see notes 88-95 *infra*.

13. Each of the appellants were owners of a substantial number of outdoor advertising displays (approximately 500 to 800) in the City of San Diego. Brief for Appellant app. H-Joint Stipulation of Facts at 119, *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981). *Metromedia, Inc.* and *Pacific Outdoor Advertising* brought suit separately and were consolidated by stipulation at the Superior Court of San Diego County. *Id.* at 81a.

join enforcement of a San Diego zoning ordinance<sup>14</sup> prohibiting most outdoor advertising displays.<sup>15</sup> Appellants argued that the ordinance

14. *Id.* at 18-33. The San Diego Ordinance's declared purposes were traffic safety, aesthetics, and public health, safety, and welfare. SAN DIEGO, CAL., CODE § 101.0700(A). Further, the ordinance provides that "it is the purpose of these regulations to eliminate . . . displays which do not relate to the premises on which they are located (and) . . . to ensure that signing is used as identification and not as advertisement. . . ." *Id.*

The general prohibition of the ordinance bans off-site outdoor advertising display signs. SAN DIEGO, CAL., CODE § 101.0700(B) (1972). The ordinance specified that the following were prohibited:

1. Any sign identifying a use, facility or service which is not located on the premises.
2. Any sign identifying a product which is not produced, sold or manufactured on the premises.
3. Any sign which advertises or otherwise directs attention to a product, service or activity, event, person, institution or business which may or may not be identified by a brand name and which occurs or is generally conducted, sold, manufactured, produced or offered elsewhere than on the premises where such sign is located.

*Id.* For a discussion of the 'on site' and 'off site' categories in the ordinance, see note 93, 95 *infra*.

The ordinance in *Metromedia* did not prohibit outdoor advertising display signs "which are either signs designating the name of the owner or occupant of the premises upon which such signs are placed, or identifying such premises; or signs advertising goods manufactured or produced or services rendered on the premises upon which such signs are placed. . . ." SAN DIEGO, CAL. CODE § 101.0700(B) (1972). The ordinance specifically exempts twelve types of signs: government signs, bench signs, signs manufactured or stored within the city limits, commemorative plaques, religious symbols, signs within shopping centers not visible beyond the premises, real estate signs, public service signs depicting time, temperature or news, signs on city regulated vehicles, signs on licensed commercial vehicles, temporary off-premise subdivision directional signs, and temporary political campaign signs. *Id.* § 101.0700(F).

15. SAN DIEGO, CAL., CODE § 101.0700(B) (1972). The California Supreme Court defined "outdoor advertising display sign" as a "rigidly assembled sign, display, or device permanently affixed to the ground or permanently attached to a building or other inherently permanent structure constituting or used for the display of, a commercial or other advertising to the public. . . ." *Metromedia, Inc. v. City of San Diego*, 26 Cal. 3d 848, 856 n.2, 610 P.2d 407, 411 n.2, 164 Cal. Rptr. 510, 513 n.2 (1980). The ordinance failed to define "outdoor advertising display sign." The California Supreme Court adopted this 'narrow' definition to avoid any potential overbreadth problems. *See id.*

The overbreadth doctrine is an exception to the rule that constitutional interests are personal and may not be asserted vicariously. The theory posits that an unnecessarily broad statute restricts or 'chills' protected speech by parties not before the court and thereby escapes judicial review. The overbreadth doctrine "permits the invalidation of regulations on First Amendment grounds even when the litigant challenging the regulation has engaged in no constitutionally protected activity." *Central Hudson Gas & Electric Co. v. Public Service Comm'n*, 447 U.S. 557, 565 n.8 (1980). *See also*

unconstitutionally abridged their first amendment rights.<sup>16</sup> San Diego defended the ordinance as a valid police power<sup>17</sup> regulation designed to advance municipal aesthetics and traffic safety.<sup>18</sup> The trial court declared the ordinance unconstitutional under the first amendment.<sup>19</sup> The California Court of Appeals affirmed the deci-

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Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 852-58 (1970).

16. See Brief for Appellant at 18-33.

17. See Brief for Appellee at 7-19. Municipal Authority over land use, such as outdoor advertising displays, is derived from the state police power.

Under the tenth amendment, "The states retain all powers not delegated to the United States . . . nor prohibited . . . by the constitution." U.S. CONST. amend. X. Chief Justice Marshall, in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), acknowledged the "immense mass" of legislative powers that a state has over its "purely internal affairs, whether of trading or police . . ." *Id.* at 203, 210-11. Ten years later, in *Mayor of New York v. Miln*, 36 U.S. (11 Pet.) 102 (1837), the Court upheld New York's authority to compel shipmasters to supply it with passenger lists. The Court held that "the act is not a regulation of commerce, but of police; . . . a power which rightfully belonged to the states." *Id.* at 131. Chief Justice Taney observed in *The License Cases*, 46 U.S. (5 How.) 504 (1847), that the police power is "nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions." *Id.* at 583. The modern understanding of the police power, first articulated in *Barbier v. Connolly*, 113 U.S. 27 (1885), is that a state may "prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity." *Id.* at 31.

The police power is delegated to municipalities by enabling statutes or by home rule provisions in the state's constitution. The California Constitution expressly grants municipalities the power to make and enforce all local health, policy, sanitary and other ordinances and regulations not in conflict with general laws. CAL. CONST. art. XI, § 7.

18. 453 U.S. at 493. See note 17 *supra*. For a discussion of aesthetics and traffic safety as police power objectives, see note 3 *supra*.

19. *Id.* at 2884. The Superior Court also held that the ordinance was an unconstitutional exercise of the city's police power. Brief for Appellant app. D at 89a-97a.

After filing separate motions for summary judgment, the parties submitted a stipulation of facts. Those of notable interest are:

2. If enforced as written, Ordinance No. 10795 will eliminate the outdoor advertising business in the city of San Diego.

20. All of the signs owned by plaintiffs in the City of San Diego are located at areas zoned for commercial and industrial purposes.

28. Outdoor advertising increases the sales of products and produces numerous direct and indirect benefits to the public. Valuable commercial, political and social information is communicated to the public through the use of outdoor advertising. Many businesses and politicians and other persons rely upon outdoor advertising because other forms of advertising are insufficient, inappropriate and prohibitively expensive.

Brief for Appellant, app H at 119a. One commentator has suggested that the city may

sion, but found it unnecessary to address the first amendment issue.<sup>20</sup> The California Supreme Court reversed,<sup>21</sup> specifically rejecting the first amendment challenge.<sup>22</sup> A plurality of the United States

have stipulated away its best argument—that the ordinance represented more than a time, place, and manner regulation and that adequate alternative forms of communication still remained. Note, *City-Wide Prohibition of Billboards: Police Power and the Freedom of Speech*, 30 HASTINGS L.J. 1597, 1599 n.9 (1979). For a discussion of time, place, and manner restrictions see note 60 and accompanying text *infra*.

20. *Metromedia, Inc. v. City of San Diego*, 67 Cal. App. 3d 84, 136 Cal. Rptr. 453 (1977). The Superior Court granted the appellant's motion for summary judgment. See Brief for Appellants app D at 89a-97a. The Court of Appeal opinion was not published in the official reports because the California Supreme Court granted a hearing. CAL. RULE OF COURT 976(d) (Deering 1980). The Court of Appeal held that the ordinance violated the due process clause, *Metromedia, Inc. v. City of San Diego*, 67 Cal. App. 3d at 84, 136 Cal. Rptr. at 460 ("to broad, too general, and too inclusive"); that the municipality did not have the power to eliminate a lawful business unless it is a nuisance, *id.*, that the ordinance conflicts with the general laws, *id.* (see, *Outdoor Advertising Act*, CAL. BUS. & PROF. CODE § 5226(b) (Deering 1976)) (billboards "should be allowed to exist in business areas, subject to reasonable controls in the public interest"); and that the city's goals could be accomplished with "more reasonable and less drastic measures." *Metromedia, Inc. v. City of San Diego*, 67 Cal. App. 3d at 84, 136 Cal. Rptr. at 460.

21. *Metromedia, Inc. v. City of San Diego*, 26 Cal. 3d 848, 610 P.2d 407, 164 Cal. Rptr. 510 (1980). An opinion of the California Supreme Court initially issued on March 21, 1979, was reported at 23 Cal. 3d 762, 592 P.2d 728, 154 Cal. Rptr. 212 (1979). A petition for rehearing was granted on May 23, 1979 thereby vacating the earlier opinion.

22. The California Supreme Court sustained the ordinance as a valid municipal police power regulation. The court held as a matter of law that billboards reasonably relate to traffic safety. 26 Cal. 3d at 859, 610 P.2d at 412, 164 Cal. Rptr. at 515. Further, the court held that aesthetics is a valid municipal police power purpose. *Id.* at 860, 610 P.2d at 412, 164 Cal. Rptr. at 515. The court overruled a 70-year-old case, *Varney & Green v. Williams*, 155 Cal. 3d 318, 100 P. 867 (1909), which had invalidated a city-wide billboard prohibition on the ground that aesthetic considerations alone could not justify the municipal police power exertion, to reach the result. *Metromedia, Inc. v. City of San Diego*, 26 Cal. 3d at 860-65, 610 P.2d at 413-15, 164 Cal. Rptr. at 516-19 (1980).

In rejecting the first amendment challenge, the court relied on three summary dismissals of appeal by the United States Supreme Court. *Id.* at 867, 610 P.2d at 417, 164 Cal. Rptr. at 520. The Court considers summary dismissals and affirmances as dispositions on the merits, *Hicks v. Miranda*, 422 U.S. 332, 344 (1975), even though they are of 'less' precedential value than an opinion on the merits.

The state court cases upholding billboard-prohibition ordinances against first amendment challenges relied on by the California Supreme Court are: *State v. Lotze*, 92 Wash. 2d 52, 593 P.2d 811, *appeal dismissed sub nom.* *Lotze v. Washington*, 444 U.S. 921 (1979); *Newman Signs, Inc. v. Hjelle*, 268 N.W.2d 741 (N.D. 1978), *appeal dismissed*, 440 U.S. 901 (1979); *Suffolk Outdoor Advertising Co. v. Hulse*, 43 N.Y.2d 483, 373 N.E.2d 263, 402 N.Y.S.2d 368 (1977), *appeal dismissed*, 439 U.S. 808 (1978). The California Supreme Court found these three summary dismissals of appeals by



Supreme Court reversed,<sup>23</sup> invalidating the ordinance as an unconstitutional restriction on noncommercial speech.<sup>24</sup> The Court noted, however, that the ordinance had permissibly regulated commercial expression.<sup>25</sup>

In a society ever vigilant in safeguarding political liberty, freedom of speech characteristically enjoys a preferred position among fundamental civil rights guaranteed by the Constitution.<sup>26</sup> Courts thus subject regulation of first amendment interests to a more exacting standard of judicial review.<sup>27</sup> While the language of the freedom of speech clause does not distinguish diverse forms of expression,<sup>28</sup> courts regularly differentiate commercial from noncommercial

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the United States Supreme Court dispositive of the first amendment issue. The court, therefore, confined most of its free speech infringement analysis to the free speech clause of the California Constitution. 26 Cal. 3d at 867-71, 610 P.2d at 416-20, 164 Cal. Rptr. at 519-23. The free speech clause of the California Constitution appears in CAL. CONST. art. I, § 2 (Deering Supp. 1981).

Justice Clark dissented from the majority's holding on the first amendment issue. He argued that the majority should not have confined its analysis of the ordinance to the limited protection afforded commercial speech because billboards carry both commercial and noncommercial messages. 26 Cal. 3d 848, 888-90, 610 P.2d 407, 430-31, 164 Cal. Rptr. 510, 533-34 (1980) (Clark, J., dissenting). He rejected the majority's conclusion that there were adequate alternative means to communicate protected speech. *Id.* at 895-96, 610 P.2d at 435-36, 164 Cal. Rptr. at 538-39. Justice Clark asserted that protected expression may not be totally prohibited simply because it is obtrusive. *Id.* at 892, 610 P.2d at 433, 164 Cal. Rptr. at 536. He concluded that the "absolute prohibition" of off-site signs did not advance either traffic safety or aesthetics. *Id.* at 894, 610 P.2d at 434, 164 Cal. Rptr. at 537 (emphasis in original).

Justices Newman and Richardson concurred in the judgment yet expressed some discontentment with the majority's first amendment analysis. Justice Newman was concerned with the scope of the ordinance, but believed the potential overbreadth problem was solvable. *Id.* at 887-88, 610 P.2d at 430, 164 Cal. Rptr. at 533 (Newman, J., concurring). Justice Richardson shared Justice Clark's doubts but felt constrained by the summary dismissals. *Id.* at 886, 610 P.2d at 429, 164 Cal. Rptr. at 532 (Richardson, J., concurring).

23. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981).

24. *Id.* at 521. See note 95 and accompanying text *infra*.

25. *Id.* at 503-12.

26. See *Kovacs v. Cooper*, 336 U.S. 77, 88 (1949); *Thomas v. Collins*, 323 U.S. 516, 527 n.12 (1944); *State v. Miller*, 83 N.J. 402, 416 A.2d 821 (1980).

27. See Brief for Appellant at 35 (a state's exercise of the police power must withstand a more exacting review where constitutional values are at issue). A more exacting review is required when First Amendment associational freedoms are implicated. *Shelton v. Tucker*, 364 U.S. 479 (1960). Similarly, *Cantwell v. Connecticut*, 310 U.S. 296 (1940), requires a more exacting scrutiny when religious freedoms are implicated by a regulation.

28. U.S. CONST. amend I. See note 4 *supra*.

speech.<sup>29</sup> Courts have traditionally reviewed billboard regulations as restrictions on commercial speech.<sup>30</sup> The degree of protection courts have afforded commercial speech, however, has varied over the years.<sup>31</sup> Furthermore, courts have traditionally failed to justify the distinction between commercial and noncommercial speech, and the resulting application of different standards of review.<sup>32</sup>

Initially, the Supreme Court refused to extend first amendment protection to commercial expression. In *Valentine v. Chrestensen*,<sup>33</sup> the Court rejected a first amendment challenge to a municipal ordinance prohibiting commercial leafletting.<sup>34</sup> The Court established the commercial speech exception,<sup>35</sup> holding that the first amendment does not protect speech which does nothing more than propose a commercial transaction.<sup>36</sup> Critics charge that the *Chrestensen* Court failed to give a reasoned justification for denying commercial speech

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29. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 n.24 (1976) (there are common sense differences between commercial and noncommercial speech). See *Central Hudson Gas & Electric Co. v. Public Service Comm'n*, 447 U.S. 557, 578 (1980) (Blackmun, J., concurring); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978).

30. See note 2 *supra*. The notion of a common sense distinction between commercial and noncommercial speech, originally suggested in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. at 771 n.24, was offered only for the limited purpose of explaining the inapplicability of the overbreadth doctrine to commercial messages, *id.*, and to justify greater flexibility in time, place, and manner restrictions. *Id.* See *Central Hudson Gas & Electric Co. v. Pub. Service Comm'n*, 447 U.S. 557, 578 (1980) (Blackmun, J., concurring).

31. See notes 33-84 and accompanying text *infra*.

32. See J. NOWAK, R. ROTUNDA & J. N. YOUNG, *HANDBOOK ON CONSTITUTIONAL LAW*, 770-73 (1978). See generally note 120 *infra* (suggesting that commercial expression serves the same first amendment values protected in noncommercial speech).

33. 316 U.S. 52 (1942).

34. *Id.* at 54-55. Mr. Chrestensen distributed a leaflet which advertised a commercial submarine exhibition on one side and a protest against the City Dock Department on the other. Justice Roberts rejected the contention that the protest withdrew the leaflet from the prohibition because the leaflet's purpose remained commercial since the Dock protest was added to evade the commercial leafletting prohibition. *Id.* at 55. See Farber, *Commercial Speech and First Amendment Theory*, 74 Nw. U. L. REV. 372, 376 (1979).

35. 316 U.S. at 54 (First amendment imposes no restraint on government as respects commercial speech).

36. *Id.* The *Chrestensen* court focused on the purpose of the expression to determine its commercial nature. *Id.* at 54-55.

first amendment protection.<sup>37</sup> Nevertheless, courts and commentators have long read *Chrestensen* as excluding commercial speech from any first amendment protection.<sup>38</sup>

The Court began to withdraw from the commercial speech doctrine of *Chrestensen* over thirty years later in *Bigelow v. Virginia*.<sup>39</sup> In *Bigelow*, a Virginia newspaper violated a state statute<sup>40</sup> by publishing an advertisement for a New York abortion referral service.<sup>41</sup> The Court characterized the leaflet in *Chrestensen* as a simple commercial proposal distinguishable from the advertisement in *Bigelow*<sup>42</sup> which

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37. See note 6 *supra*. In *Cammarano v. United States*, 358 U.S. 498 (1959), Justice Douglas, a member of the *Chrestensen* majority, describes the decision as "casual, almost offhand." *Id.* at 514 (Douglas J., concurring).

Following *Chrestensen*, application of the commercial speech exception was unpredictable. In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the Court sustained a first amendment defense in a libel suit even though the remarks were contained in a paid political advertisement. The Court stressed the content of the expression, rather than the purpose of the advertisement which *Chrestensen* had emphasized. *Id.* at 266.

Similarly, in *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973), the Court again used a content standard for determining the commerciality of expression rather than the purpose standard of *Chrestensen*. *Id.* at 384-85. The Court upheld the Commission's ban on sex-designated column headings for employment advertisements. *Id.* The Court held that the advertisements were commercial speech and therefore unprotected by the first amendment. *Id.* at 385.

After applying the *Chrestensen* doctrine inconsistently for three decades, the Court in *Bigelow v. Virginia*, 421 U.S. 809 (1975) disregarded the assumption that commercial speech was unprotected by the first amendment. *Id.* at 825. See notes 39-84 and accompanying text *infra*. The Court overruled *Chrestensen* the following year. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). For a discussion of *Virginia Pharmacy Board*, see notes 46-61 and accompanying text *infra*.

38. See notes 5, 6 *supra*.

39. 421 U.S. 809 (1975).

40. VA. CODE ANN. § 18.1-63 (1974) (repealed by 1975 Va. Acts, chs. 14, 15, §§ 18.1-1 to 18.1-429).

41. 421 U.S. 809 (1975). The Court emphasized that Virginia attempted to regulate the advertisement of a New York service. Virginia's police powers, however, cannot control abortions performed in New York. *Id.* at 813-24, 827-28. Nor could Virginia burden the right to travel by preventing its citizens from going to New York for an abortion. *Id.* at 824, 827. The Court indicated that the Virginia statute burdened interstate commerce in newspapers and periodicals carrying the advertisement. *Id.* at 828-29. The Court also recognized that the advertisement did more than merely propose a commercial transaction since it related to the constitutional interest of abortion. *Id.* at 822.

42. *Id.*

contained important information of public interest.<sup>43</sup> The Court adopted a balancing approach<sup>44</sup> to assess the regulation's constitutionality and held that commercial advertising enjoys some degree of first amendment protection.<sup>45</sup>

A year later, the Court in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*<sup>46</sup> extended *Bigelow*<sup>47</sup> by holding that the first amendment protects commercial messages irrespective of their public importance or informational value.<sup>48</sup> In *Virginia Pharmacy Board*, a consumer group challenged a statute<sup>49</sup> prohibiting pharmacists from advertising prescription drug prices.<sup>50</sup> The Court stated that common-sense differences<sup>51</sup> between commercial and noncommercial speech justify different degrees of protection for each.<sup>52</sup> The Court dismissed the *Chrestensen* approach as too simplistic<sup>53</sup> and attempted to balance, as it had in *Bigelow*,<sup>54</sup> the conflicting state<sup>55</sup> and first amendment interests.<sup>56</sup> The Court concluded

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43. *Id.* Justice Rehnquist, joined by Justice White, dissented, criticizing the majority's distinguishing the *Bigelow* advertisement for first amendment purposes on the basis of content. They argued that the advertisement's commercial character was not altered by the minimal public interest and factual information it contained about abortion referral services. They concluded that just as in *Chrestensen*, a "proposition directed toward the exchange of services rather than the exchange of ideas retains its commerciality even if it involves some expression of opinion. *Id.* at 831-33 (Rehnquist, J., dissenting).

44. *See id.* at 826 ("a court may not escape the task of assessing the first amendment interest at stake and weighing it against the public interest allegedly served by the regulation . . .").

45. *See id.*

46. 425 U.S. 748 (1976).

47. *Id.* at 760.

48. *Id.* at 765. The *Virginia Pharmacy Board* Court acknowledged that the subject matter of the advertisement in *Bigelow* may have created "some fragment of hope for the continuing validity of a 'commercial speech' exception . . ." *Id.* at 760. The Court resolved any lingering ambiguity, however, holding that speech will not be denied First Amendment protection simply because it is commercial. *Id.* at 760-62.

49. VA. CODE § 54-524 (1974).

50. *Id.*

51. 425 U.S. at 771 n.24. *See generally* notes 7, 28-31 *supra*.

52. *Id.*

53. 425 U.S. at 759.

54. *See* note 44 *supra*.

55. The State of Virginia argued that the statute was designed to protect the professional image of pharmacists and to prevent price competition which could damage the quality of pharmaceutical services. 425 U.S. at 766-68.

that the Virginia statute unconstitutionally infringed upon society's interest in the free flow of commercial information.<sup>57</sup> For the first time the Court firmly<sup>58</sup> held that the first amendment protects purely commercial speech.<sup>59</sup> The Court added, however, that a state could impose a proper time, place, and manner restriction<sup>60</sup> on commercial expression.<sup>61</sup>

In *Linmark Associates, Inc. v. Township of Willingboro*,<sup>62</sup> the Court significantly expanded the scope of protected commercial speech.<sup>63</sup> Earlier courts had extended first amendment protection to commercial expression arguably linked with important public issues<sup>64</sup>—such

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56. See *id.* at 762-65 (the free flow of commercial information). The Court balanced the First Amendment interests of pharmacists, consumers, and society against the statute's justifications (see note 54 *supra*) and concluded that the regulation violated the First Amendment. See *id.* at 766-70.

57. *Id.* at 770.

58. See note 48 *supra*.

59. 425 U.S. at 762 (commercial expression does not lack "all protection"). For a discussion on 'purely' commercial speech, see note 1 *supra*.

60. 425 U.S. at 771. The Court acknowledged the first amendment time, place, and manner exception. A time, place and manner restriction is permissible if it is content neutral, serves a significant governmental interest, and leaves open other alternative channels for communication. *Id.* See, e.g., *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 535-44 (1980) (ban on inserts containing information on controversial issues into monthly consumer bills by public utility held invalid); *Grayned v. City of Rockford*, 408 U.S. 104 (1972) (ban on willful noisemaking, on grounds adjacent to a school, which disturbs the school's ordinary operations, held invalid); *Cox v. Louisiana*, 379 U.S. 536, 554-55 (1965) (ban on demonstrations in or near a courthouse with the intent to obstruct justice held valid).

61. 425 U.S. at 771. The Court in *Virginia Pharmacy Board* indicated that although the first amendment protects commercial speech, common sense differences suggest a different degree of protection is necessary for it than other forms of speech. *Id.* at 771 n.24. The Court goes on to suggest reasons for the disparity of treatment. *Id.* Commercial speech is more easily verifiable. *Id.* Commercial speech is more durable since the profit motive reduces the possibility of its being chilled. *Id.* But see note 120 *infra*.

62. 431 U.S. 85 (1977).

63. *Id.* at 92-97. The *Linmark* decision extended first amendment protection to commercial expression unrelated to other important public issues. The *Bigelow* advertisement contained information about abortions. 421 U.S. 809 (1975). The *Virginia Pharmacy Board* decision invalidated a statute prohibiting advertisement of prescription drug prices. 425 U.S. 748 (1976). The *Linmark* statute, however, merely prohibited the posting of "For Sale" and "Sold" signs on residential property. 431 U.S. at 94. By invalidating the statute, the *Linmark* court broadened the definition of protected commercial speech.

64. *Id.* The *Linmark* holding—that an ordinance which impairs the flow of legitimate commercial information is unconstitutional, *id.* at 98—strengthened the Court's

as abortion in *Bigelow*, and drug price competition in *Virginia Pharmacy Board*. In *Linmark*, the Court invalidated a municipal ordinance prohibiting the posting of "For Sale" and "Sold" signs on residential property.<sup>65</sup> The city attempted to distinguish the *Bigelow* and *Virginia Pharmacy Board* cases by arguing that the ordinance only restricted one manner of communication.<sup>66</sup> The Court recognized, as it did in *Virginia Pharmacy Board*, that an ordinance regulating only the time, place or manner<sup>67</sup> of speech warrants a lesser standard of review<sup>68</sup> if alternate channels of communication are

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position in *Virginia Pharmacy Board*. 425 U.S. 748 (1976). In *Linmark*, the Court analyzed the nature of the restriction to determine whether it regulated on the basis of content or factors unrelated to content. 431 U.S. at 92-94. A content-neutral ordinance which incidentally affects speech while furthering a valid police power goal does not regulate speech per se. *See id.* Therefore, the first amendment is not implicated. *See id.* *See also Commercial Speech*, *supra* note 3, at 949-51. The ordinance involved in *Linmark* regulated on the basis of content. 431 U.S. at 92-93. In *Virginia Pharmacy Board*, the Court balanced the state interest supporting the content based regulation against the infringement on individual freedom. 425 U.S. at 766-69. The *Linmark* court did not, however, undertake a balancing test. 431 U.S. at 92-94. *Linmark* suggests that even with a compelling state interest, an ordinance which restricts the flow of legitimate commercial information is invalid. *Id.* at 95. Important state interests remain a factor, however, in "time, place, and manner" cases. *Id.* at 93-94.

The *Linmark* implication—that content based regulations are unconstitutional regardless of the state interests involved, 431 U.S. at 95—has not been developed by the Court. *See Consolidated Edison Co. v. Public Service Comm'n.*, 447 U.S. 530, 537-38, n.5 (1980) (listing numerous 'narrow exceptions' to the first amendment's hostility to subject matter distinctions—notably, commercial speech). *See also Central Hudson Gas & Electric Co. v. Public Service Comm'n.*, 447 U.S. 557, 561-63 (1980) (content based restriction on commercial speech subjected to four-step analysis).

65. 431 U.S. 85, 97 (1977). The governmental interest advanced by the city was the promotion on "stable, racially integrated housing." *Id.* at 94.

66. *Id.* at 92-93. The township argued that because the ordinance only restricted one means of communication, the regulation less directly implicated first amendment concerns. The township attempted, therefore, to characterize the ordinance as a time, place and manner restriction. The Court rejected this characterization because no adequate alternatives were available, and because the ordinance regulated on the basis of content. *Id.* at 94.

67. *See* note 60 *supra*.

68. 431 U.S. 85, 93 (1977). *See, e.g., Consolidated Edison Co. v. Public Service Comm'n.*, 447 U.S. 530, 536 (1980) (restriction that regulates only the time, place or manner of speech may be imposed so long as reasonable). *Cf., Niemotko v. Maryland*, 340 U.S. 268, 282 (1951) (Frankfurter, J., concurring) (regulation based on content must be scrutinized more carefully). *See generally* Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

available.<sup>69</sup> The Court determined, however, that the ordinance regulated legitimate commercial information on the basis of content<sup>70</sup> and required, therefore, a strict standard of review.<sup>71</sup> After strictly scrutinizing the ordinance,<sup>72</sup> the Court held that the content-based regulation, though supported by a significant municipal interest,<sup>73</sup> unconstitutionally restricted the flow of legitimate commercial information.<sup>74</sup>

The Court retreated from the *Linmark* strict scrutiny standard<sup>75</sup> to an intermediate level of review for content-based regulations in *Central Hudson Gas & Electric Co. v. Public Service Commission*.<sup>76</sup> In *Central Hudson*, the Court invalidated on first amendment grounds<sup>77</sup> a New York Public Service Commission regulation prohibiting advertising by the electric utilities.<sup>78</sup> The Court established a four-step

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69. *Linmark Assoc., Inc. v. Township of Willingboro*, 431 U.S. 85, 93 (1977) (must leave open ample alternative channels for communication). See note 60 *supra*.

The *Linmark* Court suggested that cost, degree of autonomy, and effectiveness are factors in determining if there are "ample alternatives." 431 U.S. at 93.

70. *Id.* at 93-94. *Linmark* does not suggest a test to determine whether an ordinance places an undue restraint on content. See note 64 *supra*. A primary consideration is the availability of "ample alternatives" for communication. See note 69 and accompanying text *supra*. The *Linmark* Court held that the alternatives available—word of mouth, real estate listings, newspaper advertisements—were insufficient. 431 U.S. at 92-94.

71. *Id.* at 96-97. See *Central Hudson Gas & Electric Co. v. Public Service Comm'n.*, 447 U.S. 557, 577 (1980) (Blackmun, J., concurring) ("The Court in *Linmark* resolved beyond all doubt that a strict standard of review applies to suppression of commercial information . . ."); *Niemotko v. Maryland*, 340 U.S. 268, 282 (1951) (Frankfurter, J., concurring) (regulation based on content must be scrutinized more carefully).

72. The Court in *Linmark* focused on whether the ordinance regulated the content of the speech or was limited to noncontent oriented criteria. 431 U.S. 85, 92-93 (1977). See note 64 *supra*. One commentator suggests that an ordinance that regulates the time, place, or manner of expression in an attempt to further a proper police power objective presents no First Amendment problem since there isn't any regulation of speech. If the ordinance regulated based on content criteria, however, the first amendment protection must be examined. See Note, *Commercial Speech*, *supra* note 3, at 949-50.

73. 431 U.S. 85, 94-96 (1977). The *Linmark* Court recognized the municipality's substantial interest in promoting stable integrated housing. *Id.*

74. *Id.* at 98.

75. See notes 68-69, 71-72 and accompanying text *supra*.

76. 447 U.S. 557, 564 (1980). But see *id.* at 573 (Blackmun, J., concurring) (objection to use of an intermediate level of review to scrutinize content-based regulation).

77. *Id.* at 558-61.

78. See New York Public Service Commission, Statement of Policy on Advertis-

analysis of content-based restrictions on commercial speech.<sup>79</sup> First, the advertisement must not contain unlawful or misleading information so as to withdraw it from first amendment protection.<sup>80</sup> Second, the state must assert a substantial governmental interest.<sup>81</sup> If these two criteria are met, the regulation must directly advance the asserted interest<sup>82</sup> in a manner no more extensive than necessary.<sup>83</sup> Applying this four-step test, the Court held that the advertising prohibition unnecessarily restricted commercial speech and lacked a direct connection with the state's interest in energy conservation.<sup>84</sup>

In *Metromedia, Inc. v. City of San Diego*,<sup>85</sup> a plurality of the Court found that the municipal ordinance<sup>86</sup> met the *Central Hudson* re-

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ing and Promotional Practices of Public Utilities, No. 27,052 (Feb. 25, 1977), cited in 94 HARV. L. REV. 159, 159 n.3 (1980).

79. 447 U.S. at 566. The Court indicated that the protection available for a commercial expression turns on both the nature of the expression and the governmental interests served by its regulation. *Id.* at 563.

80. 447 U.S. at 563, 566 (1980). Similarly, previous courts held that misleading commercial speech and commercial advertising related to unlawful activity are unprotected by the first amendment. See *Friedman v. Rogers*, 440 U.S. 1 (1979) (optometrists may be prohibited from practicing under a trade name because it is likely to mislead consumers); *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973) (prohibits sexual classification of job advertisements because sex discrimination in employment is illegal).

81. 447 U.S. at 564, 566. The Court departed from its traditional approach to content-based restrictions by requiring a substantial rather than a compelling state interest. *Id.* at 564. Justice Blackmun objected to this departure and the lesser protection afforded commercial speech under the Court's intermediate level of scrutiny. 447 U.S. at 575-79 (Blackmun, J., concurring). He argued that the *Linmark* Court "resolved beyond all doubt" that a strict standard of review applies to content-based restrictions of truthful commercial information. *Id.* at 577 (Blackmun, J., concurring). See *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 96 (1977).

82. 447 U.S. at 564, 566 (1980). The Court derived the requirement that the regulation directly advance the asserted substantial interest from *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), and *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), which prohibited advertising designed indirectly to protect ethical and performance standards of the pharmaceutical and legal professions, respectively. See 447 U.S. at 564.

83. *Id.* at 565-66.

84. *Id.* at 566-71. The Court noted that the banned advertisements were neither unlawful nor misleading. The state interests in energy conservation and distributional rate fairness were substantial. The state interests were not, however, directly advanced by the regulation. Further, the regulation was not narrowly drawn to achieve these interests. *Id.*

85. 453 U.S. 490 (1981).

86. See notes 14-15 *supra*.



quirements for commercial speech regulation.<sup>87</sup> Justice White, writing for the plurality, purported<sup>88</sup> to scrutinize the content-based regulation<sup>89</sup> under the *Central Hudson* intermediate level of review.<sup>90</sup> He found the advertising at issue neither misleading nor unlawful, and the city's interests in traffic safety and aesthetics substantial.<sup>91</sup> Acknowledging an apparent incongruity,<sup>92</sup> Justice White nevertheless concluded the city could reasonably find that off-site commercial billboards have a greater impact on traffic safety and aesthetics than do on-site commercial billboards.<sup>93</sup> The plurality determined, there-

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87. 453 U.S. at 512.

88. 453 U.S. at 503-21, 517 n.22 & n.24. Justice White criticized Chief Justice Burger for adopting the lesser standard of review appropriate in time, place and manner cases. 453 U.S. at 517-21, 517 n.22 & n.24. This criticism is, in fact, correct. See notes 102-04 and accompanying text *infra*. Justice White also fails, however, to apply the *Central Hudson* intermediate level of review properly. At several points in the opinion, he finds that the "city could reasonably conclude," or that there is nothing to suggest, that the legislative judgment on the effects of billboards on traffic safety was "manifestly unreasonable." 453 U.S. at 508-12. Such statements demonstrate a misunderstanding of the intermediate level of review and the *Central Hudson* test. *Id.* at 528 n.7, 534 n.12 (Brennan, J., concurring) ("hardly a sufficient finding under the heightened scrutiny appropriate . . . [B]ut *Central Hudson* demands more than a rational basis . . .").

89. Time, place, and manner restrictions are permissible if they regulate without reference to the content of the regulated speech. See note 60 and accompanying text *supra*. Because the San Diego ordinance distinguishes between permissible and impermissible signs at a particular location by reference to their content, the plurality appropriately refused to characterize the ordinance as a time, place and manner restriction. See 453 U.S. at 516-17 ("whether or not the distinctions are themselves constitutional, they take the regulation out of the domain of time, place, and manner restrictions").

90. *Id.* 453 U.S. at 507-12, 517 n.22, n.23.

91. *Id.* at 507-12.

92. *Id.* at 511. See note 95 *infra*.

93. 453 U.S. at 511. Compare *id.* at 511 with *id.* at 534-36 and *id.* at 534 n.12. The ordinance permits on-site advertising yet prohibits identical advertising off-site. See note 14 *supra*. It is not intuitively apparent that this distinction in treatment of on-site and off-site advertising displays directly advances either traffic safety or aesthetics. Identical billboards located on the same property—one advertising goods manufactured on the site, the other goods manufactured off the site—have the same impact on traffic safety and aesthetics. It is not constitutionally sufficient under the *Central Hudson* intermediate level of review that Justice White finds the city could reasonably conclude the ordinance directly advances traffic safety and aesthetics. See note 88 *supra*. *Central Hudson* requires more than a merely rational fit between the governmental interest asserted and the restrictive means chosen to effectuate that interest.

Justice White argued, however, that the otherwise valid prohibition of off-site commercial billboards, was not less valid because on-site commercials were expected. 453 U.S. at 511. San Diego has made a policy choice, on-site commercial billboards over

fore, that the ordinance was not more restrictive than was necessary to directly advance the city's interests.<sup>94</sup> The plurality invalidated the ordinance, however, because it impermissibly restricted noncommercial speech.<sup>95</sup>

Justice Brennan concurred in the judgment,<sup>96</sup> but expressed dissatisfaction with the limited protection afforded commercial speech.<sup>97</sup> He criticized the plurality for deferentially accepting the city's finding that a total prohibition of off-site commercial billboards directly advanced the interests of traffic safety and aesthetics.<sup>98</sup> In particular, he objected to the plurality's comments that the city could reasonably conclude that off-site commercial billboards have a greater impact on

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off-site commercial billboards. In a limited situation, then, the city's interests yield to on-site commercial advertising. *Id.* But see *id.* at 534 (Brennan, J., concurring) ("under this view the city with merely a reasonable justification could pick and choose between those it would and would not allow.").

94. *Id.* at 511-12.

95. *Id.* at 512-17. Justice White interpreted the on-site exception to the general prohibition of the ordinance as limited solely to commercial speech. *Id.* at 493-96. But see *id.* at 535 (Brennan, J., concurring). Justice Brennan does not interpret the on-site exception as limited to commercial speech. He reads the ordinance to mean that the permissible content of a sign within the on-site exception depends strictly on the identity of the owner or occupant of the premises. *Id.* Justice White finds no similar on-site exception for noncommercial speech. *Id.* at 513. He argues that noncommercial on-site billboards have no greater impact on traffic safety and aesthetics than do commercial on-site billboards. *Id.* at 513-15. Justice White advances the same argument, therefore, that he rejected earlier in the commercial on-site/off-site exception issue. See note 93 *supra*. Justice White indicates that commercial speech cases have given noncommercial speech greater first amendment protection than commercial speech. 453 U.S. at 513. Thus, the ordinance inverts this position. *Id.* He concludes, therefore, that "insofar as the ordinance tolerates billboards, it cannot choose to limit their content to commercial messages." *Id.* at 513.

Justice White also indicates that the ordinance improperly distinguishes between permissible and impermissible noncommercial signs at a particular site by reference to their content. *Id.* at 516. He arrives at this conclusion by noting that the ordinance contains exceptions to the noncommercial sign prohibition. *Id.* at 514-15. But see *id.* at 565 (Burger, C.J., dissenting) (plurality trivializes genuine first amendment values by basing holding on exceptions).

Finally, Justice White rejects the possibility that the ordinance can be characterized as a time, place, and manner restriction. *Id.* at 515-17. The ordinance does not generally ban billboards as an unacceptable manner. Those billboards that are banned are banned everywhere; there are no alternative channels of communication. Moreover, the ordinance distinguishes on the basis of content. *Id.*

96. *Id.* at 521 (Brennan, J., concurring).

97. *Id.* at 534-40 (Brennan, J., concurring).

98. *Id.* at 528 (Brennan, J., concurring).

traffic safety and aesthetics than on-site commercial billboards.<sup>99</sup> Justice Brennan persuasively noted that the apparent reasonableness of a finding can hardly suffice under the heightened scrutiny appropriate for the case.<sup>100</sup>

In his dissent, Justice Rehnquist argued that the judiciary possesses no greater ability to determine whether the billboard prohibition advances aesthetics than the city.<sup>101</sup> Chief Justice Burger agreed, arguing in dissent that given a reasonable approach to a substantial interest, the Court need only determine whether the city's approach is essentially content-neutral, and that adequate alternative channels of communication are available.<sup>102</sup> The Chief Justice, therefore, analyzed the case under an improper standard of review,<sup>103</sup> having mistaken the ordinance for a time, place, and manner restriction.<sup>104</sup> Chief Justice Burger recognized, however, that the plurality leaves cities with an unsatisfactory choice between total billboard prohibition or total acceptance of noncommercial billboards.<sup>105</sup>

Justice Stevens, dissenting,<sup>106</sup> argued that the plurality invalidated the ordinance because the regulation did not restrict enough speech.<sup>107</sup> Hypothesizing that a total billboard prohibition is constitutional under the plurality's analysis,<sup>108</sup> Justice Stevens suggested

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99. *Id.* at 528-29.

100. *Id.* at 528 n.7, 534 n.12.

101. *Id.* at 569-70 (Rehnquist, J., dissenting).

102. *Id.* at 561 (Burger, C.J., dissenting).

103. *See id.* at 517 n.23. Chief Justice Burger applied the lesser standard of scrutiny applicable in time, place and manner restrictions. *See* notes 60, 89 *supra*; note 104 *infra*.

104. *See* 453 U.S. at 517 n.23. Clearly, the ordinance is not a time, place, and manner restriction. *See id.* Time, place and manner restrictions must serve a significant governmental interest, leave open ample alternative means of communication, and regulate without reference to the content of the regulated speech. *E.g.*, *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 93-95 (1977); *Virginia Board of Pharmacy v. Virginia Consumer Council*, 425 U.S. 748, 771 (1976). The parties have by stipulation removed the possibility of ample alternative channels of communication. *See* 453 U.S. at 497 (quoting parties Joint Stipulation of Facts, no. 28). Also, the ordinance distinguishes for the purposes of regulation on the basis of content. *Id.* at 516-17. *See* note 89 *supra*.

105. 453 U.S. at 564 (Burger, J., dissenting).

106. *Id.* at 540 (Stevens, J., dissenting).

107. *Id.* at 540 & n.2 (Stevens, J., dissenting).

108. 453 U.S. at 541. *See id.* at 515 n.20 ("Because a total prohibition of outdoor advertising is not before us, we do not indicate whether such a ban would be consistent with the first amendment"). *Cf. id.* at 536-38 (Brennan, J., concurring in the

that it is difficult to understand why a less restrictive approach is invalid.<sup>109</sup> He concluded, as did the Chief Justice,<sup>110</sup> that nothing in the ordinance poses a serious threat to the first amendment.<sup>111</sup>

The plurality in *Metromedia* misapplied the *Central Hudson* test.<sup>112</sup> Justice Brennan accurately observed<sup>113</sup> that *Central Hudson* requires more than a rational nexus between the interests asserted and the means chosen to effectuate those interests.<sup>114</sup> It is not constitutionally satisfactory under an intermediate level of review that the content-based distinctions underlying a commercial speech restriction appear reasonable.<sup>115</sup> The first amendment, as interpreted by *Central Hudson*, requires that content-based commercial speech restrictions directly advance substantial governmental interests in a manner no more extensive than necessary.<sup>116</sup>

Although *Central Hudson* clarified the degree of protection afforded commercial expression,<sup>117</sup> the Court in *Metromedia* failed to recognize the need for further substantive reform of the commercial speech doctrine. Each opinion in *Metromedia* acknowledged,<sup>118</sup> as did *Bigelow*, *Virginia Pharmacy Board*, and *Linmark*, that commercial speech is neither completely vulnerable to municipal restriction

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judgment) (the plurality does not decide the constitutionality of a total ban yet sends a signal to cities that bifurcated billboard regulations prohibiting commercial messages but allowing noncommercial messages are constitutional); *id.* at 570 (Rehnquist, J., dissenting) (an aesthetic justification alone is sufficient to sustain a total prohibition of billboards).

109. 453 U.S. at 553 (Stevens, J., dissenting) (since a wholly impartial ban on billboards would be permissible, it is difficult to understand why a ban with exceptions poses a greater threat to the First Amendment).

110. *Id.* at 553 (Stevens, J., dissenting). See also *id.* at 566 (Burger, C.J., dissenting).

111. *Id.* at 553 (Stevens, J., dissenting).

112. See notes 76-83 and accompanying text *supra*.

113. 453 U.S. at 534 n.12 (Brennan, J., concurring).

114. See *Central Hudson Gas & Electric Co. v. Public Service Commission*, 447 U.S. 557, 564 (1980). See also note 93 *supra*.

115. 453 U.S. at 528, 534 n.12 (Brennan, J., concurring).

116. *Central Hudson Gas & Electric Co. v. Public Service Commission*, 447 U.S. 557, 564-65 (1980). See *In re Primus*, 436 U.S. 412, 438 (1978) (speech restrictions must be narrowly drawn).

117. See 94 HARV. L. REV. 159, 168 (1981).

118. See 453 U.S. at 512-17; *id.* at 534-40 (Brennan, J., concurring in the judgment); *id.* at 563; (Burger, C.J., dissenting); *id.* at 540 (Stevens, J., dissenting) (joins part I and IV of the plurality opinion); *id.* at 569 (Rehnquist, J., dissenting) (agreeing substantially with the opinions expressed in C.J. Burger and J. Stevens dissents).

nor protected to the extent of noncommercial expression.<sup>119</sup> This uncertainty as to the scope of protection that commercial speech enjoys will remain so long as the Court fails to articulate the values served by protecting commercial speech under the first amendment.<sup>120</sup>

The *Metromedia, Inc. v. City of San Diego* decision leaves municipalities facing local aesthetic and traffic safety problems without discernible guidance. Because the scope of protection for commercial expression is uncertain, the commercial speech doctrine remains vague.<sup>121</sup> Absent a meaningful articulation on the scope of first amendment protection that commercial speech enjoys, the commercial speech doctrine continues as an ad hoc balancing test defying consistent application.<sup>122</sup> City planners attempting to regulate commercial speech as a means of confronting local urban problems need

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119. See generally notes 39-74 *supra* (discussing the *Bigelow*, *Virginia Pharmacy Board*, and *Linmark* decisions' extension of first amendment protection to commercial speech); *Billboard Control*, *supra* note 2, at 326.

120. See *Billboard Control*, *supra* note 2, at 326-27. The first amendment protects expression if it furthers identifiable first amendment values. *Id.* The principal values of the first amendment are the dissemination of ideas and information and individual self-expression. See, e.g., *Free Expression*, *supra* note 6, at 472; Comment, *Commercial Speech and the Limits of Legal Advertising*, 58 OR. L. REV. 193, 194 (1979); 94 HARV. L. REV. 159, 165 (1981). Commercial expression serves the first amendment, therefore, by enhancing the unrestricted flow of information. See, e.g., *Free Expression*, *supra* note 6, at 432-34, 443-48; 94 HARV. L. REV. 159, 165 (1980-81). But see Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1, 3 (1976) (arguing that the first amendment is principally designed to protect self-expression and that commercial speech does not further this goal). By increasing the marketplace of information available to the public, commercial expression facilitates the rational decisionmaking that aids private self-government. See, e.g., *Free Expression*, *supra* note 6, at 432-34, 441-43; 94 HARV. L. REV. 159, 165 (1981). Thus, commercial expression serves the first amendment by aiding the private self-governing function. See *Free Expression*, *supra* note 6, at 445. Finally, non-informational commercial expression furthers the first amendment value of self-expression. See *Free Expression*, *supra* note 6, at 446-47; 94 HARV. L. REV. 159, 165 (1981) ("Even the purest forms of commercial advertising manifest some artistic and individual expressions of their creators"). But see *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 804-05 (1978) (White, J., dissenting) ("what some have considered to be the principal function of the first amendment, the use of communication as a means of self-expression, self-realization, and self-fulfillment is not at all furthered by corporate speech . . .").

121. See notes 117-20 and accompanying text *supra*.

122. See Comment, *Billboard Control*, *supra* note 2, at 328 n.197.

substantive reform of the commercial speech doctrine to aid their efforts. The *Metromedia* Court failed to provide that reform.

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## **RECENT DEVELOPMENTS**



